

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONTE MCCLELLON,

Plaintiff,

v.

OPTIONSHOUSE,

Defendant.

CASE NO. C18-0817-JCC

ORDER

This matter comes before the Court on Defendant's motion to dismiss (Dkt. No. 18). Having thoroughly considered the parties' briefing and the relevant record, the Court hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

Plaintiff Donte McClellon ("McClellon") alleges Defendant OptionsHouse ("E*Trade") is liable to him for a series of fraudulent withdrawals from his brokerage account in 2017. (Dkt. No. 1-1 at 2-5.) McClellon previously brought his claims with the Financial Industry Regulatory Authority, which it dismissed without prejudice. (Dkt. No. 1-1 at 5).

On May 17, 2018, McClellon filed this lawsuit in King County Superior Court. (Dkt. No. 1-1 at 2.) On June 5, 2018, E*Trade, as successor in interest to OptionsHouse, removed the case to this Court. (Dkt. Nos. 1-2, 2 at 1.) On June 12, 2018, McClellon filed a motion to remand the case to state court (Dkt. No. 11). The Court denied McClellon's motion to remand (Dkt. No. 19).

1 E*Trade filed this motion to dismiss McClellon's complaint for failure to state a claim (Dkt. No.
2 18). McClellon has not responded to the motion.

3 **II. DISCUSSION**

4 **A. Legal Standard for Motion to Dismiss**

5 A defendant may move for dismissal when a plaintiff "fails to state a claim upon which
6 relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must
7 contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its
8 face.¹ *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim has facial plausibility when the
9 plaintiff pleads factual content that allows the Court to draw the reasonable inference that the
10 defendant is liable for the misconduct alleged. *Id.* at 678. Although the Court must accept as true
11 a complaint's well-pleaded facts, conclusory allegations of law and unwarranted inferences will
12 not defeat an otherwise proper Rule 12(b)(6) motion. *Vasquez v. L.A. Cty.*, 487 F.3d 1246, 1249
13 (9th Cir. 2007). A plaintiff is obligated to provide grounds for her entitlement to relief that
14 amount to more than labels and conclusions or a formulaic recitation of the elements of a cause
15 of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). "[T]he pleading standard Rule 8
16 announces does not require 'detailed factual allegations,' but it demands more than an
17 unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678.

18 **B. E*Trade's Motion to Dismiss**

19 E*Trade asks the Court to dismiss McClellon's complaint because it relies on conclusory
20 allegations that are unsupported by facts demonstrating E*Trade is liable for wrongdoing.² (Dkt.
21 No. 18 at 2.) McClellon asserts OptionsHouse violated the Washington State Consumer

22 ¹ E*Trade additionally argues that McClellon's claims should be scrutinized under
23 Federal Rule of Civil Procedure 9(b)'s heightened pleading standard because his claims allege
24 fraud. (Dkt. No. 18 at 4.) The Court need not apply the Rule 9(b) standard because it finds that
25 McClellon's complaint fails under the general plausibility pleading standard required by Federal
26 Rule of Civil Procedure 8.

² The Court may consider McClellon's non-response to E*Trade's motion to dismiss as
an admission that the motion has merit. *See* W.D. Wash. Local Civ. R. 7(b)(2).

1 Protection Act (“WCPA”), violated the Washington State Securities Act (“WSSA”), and
2 committed breach of contract and negligence. (Dkt. No. 1-1 at 2.) In support of these causes of
3 action, McClellon alleges that five unauthorized withdrawals, totaling approximately \$17,000,
4 were made from his brokerage account between March and April 2017. (Dkt. No. 1-1 at 4.)
5 McClellon states that the funds in the brokerage account were his, but that he had never
6 conducted any trades or withdrawals from the account. (*Id.* at 3–4.) McClellon alleges that he
7 informed E*Trade of the purported fraudulent activity in his account. (*Id.* at 3.) A representative
8 of E*Trade allegedly told McClellon that “there is no indication that the trades placed in your
9 OptionsHouse account were done in a fraudulent manner. Furthermore, OptionsHouse has no
10 evidence or reports of fraudulent activity taking place in your account.” (*Id.*)

11 1. WCPA Claim

12 McClellon asserts a claim under the WCPA “based upon Defendant’s blatant self-dealing
13 and other intentional negligent misconduct in conversion, freezing, pooling, otherwise
14 manipulating Plaintiff’s funds without Plaintiff’s authorization.” (Dkt. No. 1-1 at 2.) To plead a
15 plausible WCPA claim, a plaintiff must allege facts that satisfy the following elements: “(1)
16 unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact;
17 (4) injury to plaintiff in his or her business or property; (5) causation.” *Hangman Ridge Training*
18 *Stables v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986).

19 McClellon has not plausibly alleged facts that demonstrate E*Trade committed an unfair
20 or deceptive act or practice. An unfair or deceptive act or practice can be predicated on a *per se*
21 statutory violation or an act or practice that has the capacity to deceive a substantial portion of
22 the public. *Hangman Ridge Training Stables*, 719 P.2d at 535–36. McClellon does not allege that
23 E*Trade committed any statutory violations, nor assert facts that show the alleged withdrawals
24 had the capacity to deceive a substantial portion of the public. McClellon merely asserts that he
25 did not authorize a series of withdrawals from his account. (*See* Dkt. No. 1-2 at 3.) Furthermore,
26 McClellon fails to assert facts that demonstrate E*Trade was involved with or responsible for the

1 unauthorized withdrawals. (*Id.*) His allegations against E*Trade represent “an unadorned, the-
2 defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. Therefore, the Court
3 DISMISSES McClellon’s WCPA without prejudice and with leave to amend.

4 2. WSSA Claim

5 The WSSA provides a private cause of action against a person who offers or sells a
6 security in violation of various state securities laws. *See* Wash. Rev. Code. § 21.20.430(1). At the
7 minimum, a WSSA claim must be premised on the unlawful sale or offer of a security. *See id.* at
8 § 21.20.430(1)–(3); *see also Hoffer v. State*, 755 P.2d 781, 789 (Wash. 1988).

9 McClellon has not made any allegations regarding the offer or sale of securities.
10 McClellon states that he never made any trades from his brokerage account. (Dkt. No. 1-1 at 3.)
11 Indeed, McClellon’s allegations have to do with unauthorized withdrawal of funds from the
12 account. (*Id.*) Because McClellon has failed to allege any facts regarding the sell or offer of a
13 security, his WSSA claim is DISMISSED with prejudice.³

14 3. Breach of Contract Claim

15 To state a claim for breach of contract, Plaintiff must allege that a contract imposed a
16 duty, the duty was breached, and the breach proximately caused Plaintiff harm. *Nw. Mfrs. v.*
17 *Dep’t of Labor*, 899 P.2d 6, 7 (Wash. 1995). Even assuming the parties had a contract regarding
18 the brokerage account, McClellon has failed to allege how E*Trade breached a duty under the
19 contract. While McClellon alleges that unauthorized withdrawals were made from his account,
20 he does not explain how the withdrawals caused E*Trade to breach the parties’ contract.
21 Therefore, McClellon’s breach of contract claim is DISMISSED without prejudice and with
22 leave to amend.

23 4. Negligence Claim

24 The required elements for a negligence claim are: (1) duty; (2) breach of that duty; (3)

25 _____
26 ³ Dismissal with prejudice is appropriate where, as here, no set of facts could cure the
deficiencies in Plaintiff’s claims. *See Swartz v. KPMG LLP*, 476 F.3d 756, 761 (9th Cir. 2007).

1 causation; and (4) damages. *Schooley v. Pinch's Deli Mkt., Inc.*, 912 P.2d 1044, 1046 (Wash. Ct.
2 App. 1996). Even if the Court assumes that E*Trade owed McClellon a duty to protect his funds,
3 the complaint does not plausibly allege how E*Trade breached that duty. Nor has McClellon
4 asserted facts that demonstrate E*Trade's actions or inactions caused him harm. Therefore,
5 McClellon's negligence claim is DISMISSED without prejudice and with leave to amend.

6 **III. CONCLUSION**

7 For those reasons, Defendant's motion to DISMISS (Dkt. No. 18) is GRANTED.
8 Plaintiff's claim under the WSSA is DISMISSED with prejudice and without leave to amend.
9 Plaintiff's claims under the WCPA, breach of contract, and negligence are DISMISSED without
10 prejudice and with leave to amend. If Plaintiff chooses to file an amended complaint, he must do
11 so within 21 days of this order being issued. In his amended complaint, Plaintiff must plausibly
12 allege facts that demonstrate Defendant is liable to him for the alleged unauthorized withdrawals
13 from his account. The Clerk is DIRECTED to send a copy of this order to Plaintiff.

14 DATED this 14th day of August 2018.

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A handwritten signature in black ink, appearing to read "John C. Coughenour", is written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE